COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Fitchburg Gas and Electric Light Company	**D.T.E. 99-66**

THE ATTORNEY GENERAL'S OPPOSITION
TO FITCHBURG'S MOTION TO STAY

I. INTRODUCTION.

Pursuant to G.L. c. 30A, § 14(3), the Attorney General opposes Fitchburg Gas and Electric Light Company's ("Fitchburg" or "Company") motion to stay the enforcement of the Department of Telecommunications and Energy's ("Department") May 31, 2001 order. The Company has failed to satisfy the Department's four-part test for granting the unusual remedy of a stay, and essentially reiterates issues already presented to and rejected soundly by the Department. The Company has offered no justification based in law, fact or public policy to delay the commencement of the refund of the $675,052 in cost of gas adjustment clause ("CGAC") over collections.

III. STANDARD OF REVIEW

The party seeking a stay carries the burden to justify "the Department's exercise of such an extraordinary remedy." *Boston Gas Company*, D.P.U. 92-130-A, p. 7 (1993). The moving moving

party must satisfy four separate requirements:

> (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be harmed irreparably absent a stay; (3) the prospect that others will be harmed if the Department grants the stay; and (4) the public interest in granting the stay. *See, e.g., Cuomo v. United States Nuclear Regulatory Commission,* 772 F.2d 972, 974 (C.A.D.C. 1985).

Boston Gas Company, D.P.U. 92-130-A, p. 7. The granting of a stay pending judicial review rests within the sound discretion of the Department. *Stow Municipal Electric Department*, D.P.U. 94-176, p. 2 (1996).

III. ARGUMENT.

A. The Company Has Failed To Satisfy The Department's Requirements For A Stay.

The Company's motion and the associated notice of appeal offers sparse, if any, argument to support the numerous issues raised on appeal. Beyond the rote recitation of some standards of review for administrative decisions, the Company does not engage in any sort of evaluation of the various standards in light of the noted factual, legal and evidentiary issues in the record. The Company has, in large part, neglected to explain how it is likely to prevail on the individual issues, but instead, bases its arguments on the alleged financial impact of the decision on its bottom line. The Company bears the burden to demonstrate a likelihood of success on the merits of the appeal and it has utterly failed to do so.

The Department determined that the inventory finance charges included in the Company's CGAC from 1987 through 1998 did not comply with the requirements set forth in the applicable regulations. The financing costs had not been incurred under an approved financing vehicle and,

therefore, the amounts in question were collected in violation of law. *Fitchburg Gas & Electric Light Company*, D.T.E. 98-51, pp. 21-22. The Department's longstanding precedent on this issue is clear. *Fitchburg Gas & Electric Light Company*, D.T.E. 99-66-A, p. 21. Whether one uses the term "over-collection," "double-recovery," or "wrongfully collected" charge, the fact is that there was economic harm to the Company's customers as a result of the Company charging inventory finance charges through the CGAC from 1987 through 1998.[1] As the Department correctly concluded, fairness and sound regulatory policy require that the Company's customers be reimbursed for the $675,052 that the Company wrongfully collected. Fitchburg has presented no new arguments that call for a stay of the Department's decision.

As to the second element of the test -- "the likelihood that the moving party will be harmed irreparably absent a stay" -- the Company's calculations of the financial effect of the Department's order neglect to take into consideration income tax consequences, and therefore, greatly overstate the impact on the annual net income.[2] As set forth in the affidavit of Mr. Newhard, the actual after-tax effect of the refund is less than 2.3 percent of Fitchburg Gas and Electric Company common

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[1] The Company's attempt to characterize the Department's order as a "fine" or penalty lacks merit. *See e.g.*, Fitchburg's Petition and Notice of Appeal, ¶ 16. Through the reconciling mechanism of the CGAC, the Department is simply flowing back funds improperly collected by the Company through the CGAC.

[2] The Company has offered these calculations via a June 18, 2001, affidavit of Mark H. Collin, a witness who testified during the proceedings. Fitchburg has made no attempt by motion or with argument to justify such a *de facto* supplementation of the factual record in this case so long after the record has been closed. *See* 220 C.M.R. § 1.11(8) ("No person may present additional evidence after having rested nor may any hearing be reopened after having been closed, except upon motion and showing of good cause.") The Department should reject this affidavit and it should not be included in the record. Should the Department exercise its discretion to accept the supplementation, then, in the interests of fairness and justice, the Attorney General requests that the Department also accept the attached countervailing affidavit of Timothy Newhard. Attachment A.

equity at year-end 1998.[3] *See* Attachment A, ¶ 11.

The Attorney General submits that the true harm in this case can be found in the Department's determination that the Company's customers have paid costs in violation of the Department regulations. If a refund of these improperly collected costs has a negative impact on the Company's financial position, it is simply because Fitchburg's management breached its "duty to stay abreast of regulatory developments that affect its obligations to its customers and its business practices." *Fitchburg Gas & Electric Light Company*, D.T.E. 99-66-A, p. 22. "Equitable treatment of ratepayers requires that this unjust enrichment be disgorged" notwithstanding any self-inflected harm caused stockholders. *Id.*, p. 27. Since the Company proposes to refund the over-collection across 139 months, the impact on its financial condition while the appeal is pending is *de minimus*.

As to the third element of the test -- "the prospect that others will be harmed if the Department grants the stay" -- delaying some immediate ratepayer relief in the form of the CGAC refund will certainly harm consumers in Fitchburg's gas service area, given the recent sharp rises in energy costs. Considering the inevitable ebb and flow of customers from a service area, the longer the repayment of over collections is delayed, the greater the level of refund mismatch. Finally, the Attorney General urges the Department to deny the stay since the Company has offered no showing whatsoever

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[3] Should the Department ultimately be reversed on the refund issue, any monies redistributed to customers through the CGAC may be recovered by subsequent Department adjustment since the CGAC mechanism does not raise retroactive ratemaking concerns as would an order under G. L. c 164, § 94. *Fitchburg Gas & Electric Light Company*, D.T.E. 99-66-A, p. 16. Harm which can be compensated by money damages is not irreparable. *Fisher v. Board of Selectmen of the Town of Nantucket*, 453 F.Supp. 881, 883 (D.Mass.1978). *See also Boston Gas vs. Department*, No. SJC-2001-0043, p.1 (Memorandum of Decision, February 16, 2001). Furthermore, since the proposed flow back period is over ten years, the appeal will likely be resolved long before Fitchburg refunds even a small percentage of the total over collections.

that the public interest will be served by granting the Company's request. The Company has consequently failed to fulfill the fourth and final part of the test, public interest considerations.

IV. CONCLUSION.

After balancing the considerations explained above, the Department should deny the Company's request for a stay of the May 31, 2001 order.

RESPECTFULLY SUBMITTED,

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